

permitted save with the permission of the Court. It is unlikely that a Court would permit cross-examination tending to disclose secret marks or indicia which experts know to look for on genuine notes.

The legislature has therefore placed this grave responsibility of certifying as to the genuineness or otherwise of currency notes on a very senior officer who is expected by knowledge and experience to be so expert in the detection of forgery that his certificate is to be accepted in a Court of law. He cannot delegate that responsibility. The Certificate was not one allowed by law to be admitted in evidence and it should have been rejected and not shewn to the jury.

It was suggested in argument before us that the Jury saw the notes and could judge for themselves that the notes were forgeries. We think this a dangerous and unsound suggestion.

In the first place we do not know whether the jury examined the notes and formed their own opinion from this examination that the notes were forged or whether they concluded that the notes were forged because the report, which should not have been in evidence, stated that they were forged.

In the second place, even if it were shewn that the jury examined the notes and found them to be forgeries, there would be nothing on the record to shew on what evidence they so found. While a juror may apply to the subject before him that general knowledge which any man may be supposed to have we doubt if that is sufficient for the detection of forgeries which sometimes deceive even officers of a bank.

The notes did not speak for themselves. Treating the report as rejected no testimony was on record to indicate that they were forged. The jury may accept opinions given in evidence but in this case opinion was properly put in evidence and there was no opportunity to cross-examine any witness or any juror upon the reasons which led him to the conclusion at which he had arrived.

A juror should not be regarded as a witness unless he gives evidence and is subject to cross-examination as provided in section 209 of the Criminal Procedure Code. Notwithstanding that section and the precaution it prescribes it is undesirable that a juror should be a witness, for the simple reason that he can hardly be deemed capable of impartially considering in his capacity as a juror, whether his evidence is negated by contrary evidence, or what weight or importance should be attributed to it.

The function of a juror is wholly incompatible with that of a witness, and the suggestion of the Crown amounts to this that the jurors—if they examined the notes—are to be regarded

as witnesses whose opinions the same persons in their capacity as jurymen accept.

The notes may have been forgeries but the fact that they were forgeries was not proved at the trial.

The appeal is therefore allowed.

The appellant did not claim ownership of the notes which consequently will be handed over to the police who will dispose of them by arrangement with the Accountant-General if they are not claimed before the 1st day of August 1938.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION]

HOWES, J.

July 6, 1938.

REX v. THONG CHUNG CHONG & 10 ORS.

[PENANG CRIMINAL REVISION No. 20 of 1938]

Common Gaming Houses Ordinance (Cap. 30), s. 6 (2)—playing in a gaming house—presumption—rebuttal—degree of proof.

Held, that a very slight degree of proof is required to prove that a place is not a place kept or used for gaming to which the public has or may have access and that if members of the public are on premises, where gaming is in progress, for legitimate business and not for the purpose of gaming the presumption under Section 6 (2) of the Common Gaming Houses Ordinance (Cap. 30) does not apply or is rebutted.

CRIMINAL REVISION.

Hughes, Crown Counsel, for the Crown.

Ross, for the respondents.

The facts sufficiently appear from the judgment.

Cur. Ad. Vult.

HOWES, J.—In this case, the seven Petitioners, together with three other persons, were convicted on a charge that they on or about 17th May, 1938, at 3 p.m. did play in a common gaming house, namely Elysee Hotel, and thereby committed an offence punishable under Section 6 (1), Chapter 30. One other person was similarly charged, but was acquitted.

This case comes before the Court in its revisional capacity; as since the fine imposed by Section 6 does not exceed \$25/—, there is no right of appeal.

The place in which the playing is alleged to have taken place was an office adjoining the garages of the Elysee Hotel. A portion of this office was screened off by two almeirahs, and in this portion was a table and five chairs, on one of which, at the time of the raid, according to Inspector McLennan, Accused No. 2, a "boy" employed by the Hotel, was sitting when the Inspector entered.

When the police entered, there was a general stampede: none of the 11 accused were actually seen to be playing. Upon the table, on a diagram chalked on it, were 12 piles of cents.

The eleven persons were arrested, taken to the Detective Station, and later, released on bail.

Five of the eleven accused admitted that they were playing Fan-tan. All five were either employees of, or connected with the Hotel, viz. Nos. (1), (3), (5), (10) and (11) accused. Three others Nos. (2), (4) and (6) were respectively a "boy," "second cook" and "cashier" employed by the Hotel. The remaining three viz. Nos. (7), (8) and (9) were, what the Magistrate describes in his grounds of Judgment "members of the public present while the gaming was in progress."

The presence of these three persons is the material factor to the charge; as without them, the "place" would not be a "common gaming house" within the meaning of Section 2 of the Ordinance.

Whilst none of these last-named six persons were seen to be playing, they were found in the "place," viz. behind the almeirahs, and by Section 6 (2), provided the place is shown to be a "common gaming house," on the occasion of its being entered under that Ordinance, "they shall be presumed, until the contrary is proved, to be or to have been playing therein."

Under Section 14 of the Ordinance if, (as in this case was admitted) "instruments or appliances of gaming are found in any place entered under this Ordinance.....it shall be presumed, until the contrary is proved, that the place is a common gaming house....."

The "instruments of gaming" were the matches, the money and the table marked with the chalked diagram.

There are therefore two presumptions to be rebutted by proof, firstly, that arising under Section 6 (2), by which a person found on the premises is presumed to be or have been playing therein "until the contrary is proved." The "contrary to be proved" under this Section is the fact that the person was *not* playing. He has, in fact, to prove a negative—a somewhat difficult matter; but this is a question of the weight of evidence; and before he is required to do so, it must be shown, by the presumption arising under Section 14, that the place in which he played was a common gaming house, as otherwise it is no offence. The second presumption to be rebutted is, therefore, that the place is a common gaming house.

With regard to Accused Nos. (7) and (8) two of the "members of the public" whom the Magistrate convicted; there was the evidence of Accused No. (5), (as to whom the Magistrate made no comments as to his credibility) that "(7) and (8) did not play: they asked to play but

we refused." This evidence, coupled with that of Nos. (7) and (8) themselves, and of the other witnesses who explained the presence of Nos. (7) and (8), was, in my opinion, sufficient to rebut the presumption raised by Section 6 (2) that these two persons were playing.

As was stated in *Rex v. Fong Chong Cheng* (1930) S.S.L.R. at page 145 by Stevens, J.

"It has first to be observed that in this Colony it is not illegal to play games of chance for money. But it is illegal to keep a common gaming house or to game in it, and common gaming house is either a place to which the general public are able to resort for the purpose of gaming, or a place which though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming. I say 'primarily' because I think it is clear that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble.

.....In my opinion the mischief which the law is designed to prevent is the encouragement of gambling by the use of premises either for public gambling, or for the special purpose of a gambling saloon."

Since the offence of which the accused were convicted is dependent on the fact that the place in which they played or were found, being a common gaming house, it must first be established or shown by the presumption arising under Section 14, that this back portion of the office was a common gaming house within the meaning of Section 2 of the Ordinance, viz. it must be "*a place kept or used for gaming to which the public or any class of the public has or may have access.*"

In this case, there was no question of "any class of the public"; the Magistrate was of the opinion that two of the three accused Nos. (7), (8) and (9) were members of the public; but he acquitted No. 9, apparently, on the ground that there was a doubt whether he played.

"Access" is a very wide word. The public has access to a railway station, a bank, or even a doctor's surgery. In Section 2 of the Ordinance "access" by the public refers to access to a "place kept or used for gaming" and I subscribe to the opinion expressed by Stevens, J. (*supra*) that this must mean access to a place for the purpose of gaming.

In the present case, the evidence of Accused No. (7) was that he was at the Hotel for a dancing lesson, and wished to pay a bill for \$5/- for coupons and liquor, and was told to go to the

office in question to pay it. He went to the office with Accused No. (9); and paid the \$5/-; but before he could obtain a receipt, the raid took place, and he was arrested. He got the receipt after he had been released on bail, and produced it at the trial. He denied having gambled.

Accused No. (8) was also at the Hotel for a dancing lesson, and stated that at 3 p.m. on the conclusion of the lesson, he asked the instructor where he should pay, and was told to go to the outside office, which he did with accused No. (7), and paid \$10/- on account, to the storekeeper; but, presumably on account of the raid, he, too, did not get the receipt (which he produced) until after his release.

Accused No. (9) is a bill collector and went to the Hotel for the purpose of collecting \$16.30 from Accused No. (8). He had been told that he would find Accused No. (8) at the back of the office and followed him there. He said he did not gamble, and was standing beside the almeirahs. This accused was acquitted by the Magistrate.

The evidence of the two accused Nos. (7) and (8), as regards the dancing lessons continuing until 3 p.m., was supported by Ooi Chew Eng, the Manager of the Hotel, and as to his having directed them to the office to pay their bills, after which Ooi Chew Eng left the Hotel, and was not present when the raid took place.

Although the Magistrate expressed the opinion that the "demeanour" of accused Nos. (8) and (9) in the witness-box was "unsatisfactory" and that none of these four accused (viz. Nos. (2), (4), (8) and (9)) was speaking the truth, there is nothing in the record to show that their evidence was contradicted or shaken in cross-examination. He made no comments on the evidence of the Manager which explained the presence of accused Nos. (7) and (8); or on that of Lim Chew Keng, the store-keeper, who stated that accused Nos. (7) and (8) came to the office to pay their bills, and that he was asked by the book-keeper (accused No. 10) to make out receipts for them.

The Magistrate's grounds of Judgment show that he was influenced by the fact that 12 piles of cents were staked on the table which evidently led him to conclude that all 10 of the persons he convicted had staked one stake each. The two remaining stakes were unaccounted for. The Manager, Ooi Chew Eng, stated that in Fan-tan, each player can stake on three numbers, and on the dividing lines between the numbers; so that in all five stakes can be placed by each player. The Magistrate stated "this is contrary to the expert evidence for the prosecution."

Reference to the evidence of the so-called 'expert' shows that he said nothing to the effect that a player can only stake once; nor would such rule be compatible with the rules of other games of chance. If this were so, the Magistrate would be forced to the conclusion that twelve persons were playing, although he only convicted ten out of the eleven accused.

Admittedly, the fact that instruments of gaming, were found raised the presumption that the place was a common gaming house, which presumption the accused persons had to rebut. In other words, they had to "prove the contrary" by showing that it was not "a place kept or used for gaming to which the public has or may have access."

Apart from the three accused Nos. (7), (8) and (9), it was proved that the other persons were all employees of, or connected with the Hotel, and were present there in that capacity, and not as members of the public.

The question what degree of proof is necessary to prove the contrary has been considered in several cases. O'Malley, C.J., in *Regina v. Din & ors.* (4 Kyshe at p. 618) said "I may say for myself that a very small amount of evidence to the contrary would satisfy me," and this dictum was adopted by Fisher, J., in *Rex v. Kwek Kim Chuan* (Criminal Appeal No. 38/1910 reported in *Braddell's "Common Gaming Houses"* at p. 172), where he stated: "I am quite prepared to go the full length of his (O'Malley, C.J.) holding in a case like this, where the game was played at midday in a room only separated from the street by a screen door which it appears any visitor could open, where there was no attempt at secrecy, escape or obstruction, and where it appears that the only persons who are proved or admitted to be playing were a party of friends or business clients of the occupier of the premises."

The circumstances in that case were very similar to the present.

In the present case, in my opinion, "the contrary" was proved sufficiently to rebut the presumption under Section 14 that this place was a common gaming house within the meaning of Section 2. These three "members of the public" (Accused Nos. (7), (8) and (9) were shown to have been at the Hotel on legitimate business, and not for the purpose of gaming.

There was no direct evidence that they played, and the conviction of Accused Nos. (7) and (8) rested solely on the arbitrary presumption contained in Section 6 (2).

I therefore hold the decision of the Magistrate that the place where the game was played was a common gaming house was against the weight of evidence, and wrong in law.

I accordingly reverse the finding and sentence of the Magistrate, and acquit the seven Petitioners and also the three other persons who were convicted, but who have not petitioned for revision.

The fines, if paid, are to be refunded to the convicted persons. The order of confiscation and the reward to the informer is set aside.

Conviction quashed.

[CRIMINAL REVISIONAL JURISDICTION]

McELWAINE, C.J.

July 21, 1938.

REX v. LAM CHIP HENG.

[SINGAPORE CRIMINAL REVISION No. 5 of 1938]

Municipal Ordinance (Cap.133)—Mandatory Order under S.144, sub-s. 9—Failure to comply with mandatory order—offence punishable under S. 255.

A mandatory order was made under S. 144, sub-s.9 of the Municipal Ordinance requiring the defendant to do certain work within 14 days. The defendant did not comply with the order and subsequently he was charged with having failed to comply with the order within 14 days and a penalty of 8 days was incurred thereby. A summons was issued against the defendant on the 8th of June 1938 alleging 8 days default in complying with the order (though on that day there had been apparently a default of 34 days). The case was called on the 22nd June 1938 when the accused pleaded guilty and was fined \$249.50, in respect of a default of a period longer than 8 days. The summons charged an offence for which the maximum punishment was \$80 and the charge was not amended to allege a longer default than 8 days.

Held, that the actual period of default should be set out in the charge. If it was desired to give evidence of any additional default the charge could have been amended or a new summons could have been issued charging further default. But in default of any such amendment or new summons the sentence was illegal and the fine must be reduced to the maximum penalty for the offence charged, i.e. \$80/-.

Howe, Crown Counsel, for the Crown.

McELWAINE, C.J.—Lam Chip Heng petitioned this Court to revise a sentence passed upon him. I set the case down for hearing in open Court.

The facts shortly are as follows:—In April 1937 Lam Chip Heng was fined \$25 for erecting cloth screens, in a theatre of which he was tenant, to form living compartments and a mandatory order was made (presumably under section 144 (9) of the Municipal Ordinance, Cap. 133) directing the removal of the screens within fourteen days.

On the 12th May an information was laid by a Municipal Overseer pursuant to which a summons was issued on the 8th June 1938 calling upon the said Lam Chip Heng to attend on the 22nd June "to answer to a charge that you have failed to comply with a Mandatory Order dated the 13th day of April 1938, issued under

the hand and seal of a Police Magistrate for Singapore, in accordance with the provisions of the Municipal Ordinance (Cap. 133) directing you to reinstate to its original use, the theatre which was converted into a dwelling by erecting cloth screens forming compartments on ground floor of "the said premises, within fourteen days and a default of eight days was incurred thereby, and that you have thereby committed an offence under section 255 (1) and punishable under section 255 (3) of the said Ordinance."

The case was called on 22nd June 1938 when the accused pleaded guilty and was fined \$249.50 or 2 months R.I.

The fine was apparently based on a default continuing up to 22nd June. The summons was issued on 8th June alleging eight days default though on that day there had apparently been a default of 34 days.

The maximum fine under section 255 (3) is ten dollars for each day during default.

The summons therefore charged an offence for which the maximum punishment was \$80. It is manifest that either the sentence was illegal or that the conviction was not a conviction for the offence charged.

The charge was not amended. A conviction on the charge would shew that Lam Chip Heng was convicted of a default of eight days ending on May 11th. The conviction on the face of it would be no answer to a subsequent summons for a continuing offence for a default from and including 12th May to 22nd June.

Mr. Howe directed my attention to Form J in the Schedule setting out the form of charge for an offence under section 255 and suggested that it is unnecessary to specify the number of days during which default continued. As the form of charge alleges "you have made default" it cannot mean a default continuing after the date of the summons.

But I think it proper that the actual period of default should be set out, so that the defendant may know exactly what he has got to meet. He might admit a default for a certain number of days and might well think the charge was for that number. If evidence was given of a greater number of days default, he would be entitled to give or call evidence denying the greater default.

I think the form of summons actually used is correct. Had evidence been given of default up to 22nd June (which indeed seems to have been admitted) the magistrate could have amended the summons, and if the defendant required time to answer the amended summons, an adjournment would have been appropriate; or a new summons could be issued charging the further default.